

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GLEN SCOTT MILNER

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
NAVY,

Defendant.

No. CV-06-1301- JCC

AGREED MOTION TO ESTABLISH
BRIEFING SCHEDULE

Noted: May 3, 2012

Plaintiff Glen Scott Milner (“Milner”) and Defendant United States Department of the Navy (the “Navy”), through their undersigned counsel, hereby file this their Agreed Motion for an Order Establishing a Briefing Schedule, and in support thereof, respectfully represent as follows:

Background

This case concerns Milner’s request under the Freedom of Information Act (“FOIA”) for Explosive Safety Quantity Distance (“ESQD”) records prepared for Naval Magazine Indian Island in the Puget Sound. The case is here on remand from the United States Supreme Court for further proceedings in light of that Court’s decision in *Milner v. Department of the Navy*, ___ U.S. ___, 131 S.Ct. 1259 (2011), which reversed the Ninth Circuit’s holding that the ESQD records at issue in this case were covered by what was then known as the “high-2” doctrine, 5 U.S.C. § 552(b)(2), as interpreted by *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670

1 F.2d 1051 (D.C. Cir. 1981). The Supreme Court remanded to the Ninth Circuit, which in turn
 2 remanded to this Court, to address the alternative question, not reached by the lower courts, of
 3 whether the ESQD information was “compiled for law enforcement purposes” and whether its
 4 disclosure “could reasonably be expected to endanger the life or physical safety of any
 5 individual,” and thus qualify for protection under FOIA Exemption 7F. 5 U.S.C. § 552(b)(7)(F).

6 The parties completed briefing on the Exemption 7(F) question late last year. However, on
 7 December 31, 2011, while this Court was still considering the 7(F) question, the President
 8 signed into law H.R. 1540, the National Defense Authorization Act for Fiscal Year 2012 (the
 9 “Act”), which created a new 10 U.S.C. § 130e(a), and which permits the Secretary of Defense, in
 10 accordance with Exemption Three of the FOIA, *see* 5 U.S.C. § 552(b)(3), to exempt from the
 11 FOIA what the new statute calls “Department of Defense critical infrastructure security
 12 information.” However, in order to trigger the protections of Exemption Three of the FOIA
 13 under the new statute, the Secretary of Defense (or upon delegation of this authority, the Director
 14 of Administration and Management) must make a written finding to the effect that:

15 (1) The records in question constitute Department of Defense critical infrastructure
 16 security information; and

17 (2) The public interest consideration in the disclosure of such information does not
 18 outweigh preventing the disclosure of such information.

19 10 U.S.C. § 130e(a).

20 On February 8, 2012, this Court struck the Navy’s motion for summary judgment (and by
 21 implication Milner’s cross-motion) after the Navy notified the Court that the Department of
 22 Defense had begun the administrative process to obtain the requisite findings from the Secretary
 23 of Defense (or the Director of Administration and Management), required by 10 U.S.C. § 130e
 24 to exempt the ESQD records at issue in this case under Exemption Three of the FOIA. This
 25 Court, however, welcomed the parties to submit new briefing upon the conclusion of the Navy’s
 26 administrative process.

27 The administrative process is now coming to a close. Although the process has taken
 28 longer than originally anticipated (review has had to take place by nearly all components of the

1 Department of Defense who may be required to use this process in the future), the administrative
2 process is now expected to conclude on or before June 6, 2012.

3 Accordingly, the parties respectfully request that this Court establish the following briefing
4 schedule:

5 1. On or before June 6, 2012, upon the completion of the administrative process under 10
6 U.S.C. § 130e, the Navy agrees to provide to Milner's counsel for review its draft Vaughn Index
7 and declaration(s), as well as a copy of the administrative record of the Department's decision on
8 10 U.S.C. § 130e.

9 2. Between June 6, and June 15, 2012, Milner and the Navy, through their counsel, will
10 work together to resolve any differences they have regarding the adequacy of the Vaughn Index
11 or the Navy's declaration(s), or any other matters involving the state of the administrative record,
12 in an effort to narrow the issues in dispute for the Court to decide.

13 3. On July 13, to the extent any disputes remain between the parties, the Navy shall file
14 and serve its Motion for Summary Judgment, together with its final Vaughn Index and
15 supporting declarations, as well as the administrative record for the Department's Decision on 10
16 U.S.C. § 130e.

17 4. On August 10, 2012, Milner shall file his Response to the Department's Motion for
18 Summary Judgment and a Cross-Motion for Summary Judgment.

19 5. On September 7, 2012, the Navy shall file its Reply to Milner's Response and
20 Response to Milner's Cross-Motion for Summary Judgment.

21 6. On September 21, 2012, in the event he determines it to be necessary, Milner shall file
22 a Reply to the Navy's Response to his Cross-Motion for Summary Judgment.

23 7. The Navy's Motion for Summary Judgment shall be noted on the Court's motion
24 calendar for September 21, 2012.

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Respectfully submitted,

DATED: May 3, 2012

By: s /Peter A. Winn
PETER A. WINN
Assistant United States Attorney
Attorney for Defendant

DATED: May 3, 2012.

By: s /David S. Mann
DAVID S. MANN
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